for The Defense

The Training Newsletter for the Maricopa County Public Defender's Office

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Dean W. Trebesch, Maricopa County Public Defender

Contents:

The Legal Rights of the Hearing Impaired Defendant

By Christine Funckes & Brad Bransky

Many defense practitioners will, at some point, represent a hearing impaired (deaf) client.[1] This article will provide insight on the legal rights of the hearing impaired defendant and will discuss practical solutions to attorney-client communication problems.

Arizona Revised Statues Sec. 12-242, sets forth a hearing impaired person's post-arrest rights. Essentially, the law provides that a qualified interpreter[2] shall be appointed by the court (or procured by the police agency) prior to a hearing impaired arrestee being Mirandized or interrogated.[3] Practitioners should carefully review all police interrogation procedures to ensure that the officers involved complied with A.R.S. Sec. 12-242.

Situations have arisen where an arresting officer interrogates a hearing impaired arrestee after merely showing the arrested person a written copy of his\her *Miranda* Rights.[4] In the past, the average hearing impaired adult person read at a fourth grade level. Therefore, hearing impaired arrestees often cannot comprehend the legalese of *Miranda* Warnings, nor adequately converse with the officer. A qualified interpreter can utilize appropriate sign language[5] to ensure a hearing impaired arrestee comprehends the *Miranda* Warnings and that all parties understand each other during any interrogation or statements.

Communication with a hearing impaired defendant may also be a source of some aggravation. Under the Americans With Disabilities Act, (ADA) P.L. 101-336 (July 26, 1990) all jails that house hearing impaired defendants must have a Teletype Device for the Deaf (TDD). The Arizona Council for the Deaf has been kind enough to loan a TDD to this office. The TDD machine is located in this writer's (Christine Funckes) office. A hearing impaired client who does not have access to a TDD may call through Arizona Relay System. Their number is 231-0967. If you are trying to reach a deaf client, the voice number is 275-5779. The Arizona Relay operator has a TDD, and acts as the intermediary between you and the client. A TDD machine is much faster and more private than using the Arizona Relay System.

If your client should eventually go to prison, the law entitles him to "appropriate auxiliary aids" for any program in which he\she chooses to participate. *Bonner v. Arizona Department of Corrections*, 714 F.Supp. 420 (1989). "Appropriate auxiliary aids" may include qualified interpreters, and devices such as electronic readers, and telephonic transcribers. The ADA supersedes *Bonner* and ensures that a hearing impaired person may not be precluded from participation in any program, whether in jail or prison, simply because of his/her impairment.[6]

In any release motion, counsel should alert the court to the following:

1) the jail lacks qualified interpreters;

2) the hearing impaired client is housed in a pod with a variety of individuals. All hearing impaired handicapped individuals, those who have tested positive for the AIDS virus, and homosexuals are housed together; and

3) detention officers often shout orders, and have very little patience when those orders are not complied with.

Hopefully, this article has provided insight into some of the problems a practitioner may expect to encounter while representing a hearing impaired defendant.

(cont. on pg. 2)

Endnotes:

1. A.R.S. Sec. 12-242(H)(1) defines a deaf person as "a person whose hearing impairment is so significant that the individual is impaired in processing linguistic information through hearing."

2. A.R.S. Sec. 12-242(H)(2) defines a qualified interpreter as "a person who has a certificate of competency authorized by the Arizona Council for the Deaf."

3. A.R.S. Sec. 12-242(C).

4. On November 4, 1992, Sergeant Kardasz of the Phoenix Police Department's Planning and Research Division, informed this writer that the Phoenix Police Department has no policies or procedures concerning the arrest and interrogation of deaf individuals.

5. A spectrum of sign language exists ranging from American Sign Language (ASL) to English Sign Language (ESL) or C-system. ASL differs grammatically, in both structure and syntax, from the English language. ESL is a mode of communication which parallels the English language. Depending on a person's education and experience, he/she may utilize ASL, ESL, or any combination of the two. A qualified interpreter will ascertain where on the ASL - ESL continuum a deaf individual communicates and will communicate with him on that level.

6. ADA. Title II.

FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

New Motion and Brief Bank

By Robert S. Briney

Public defender legal research has moved into the Twentieth Century. We now have a computerized Motion and Brief Bank to compliment Lexus and Westlaw in the office. Motion and Brief Bank terminals are located in the tenth floor main library, third floor appeals library, Durango juvenile facility, and the Trial Group C area at the Southeast Court Center.

The Motion and Brief Bank uses a new software scanning index that allows attorneys to search thousands of documents for key words in a matter of seconds. To research a particular subject, an attorney types into the computer those words best describing the area to be researched (i.e., automobile and search), and the computer identifies the documents containing the words. Words may be entered in a variety of combinations to facilitate precise locating of relevant materials. The computer can display all or part of any document and print any documents upon request.

The Bank contains all relevant appellate briefs written by this office within the past five years, as well as an excellent selection of motions, voir dire questions, and jury instructions. We have also added a number of form motions, appellate case summaries, sample letters, and articles from our newsletter. We are continually adding new information and welcome new material from any source. We recently purchased a sophisticated new software package that allows us to scan documents directly into the computer without retyping the document.

We will be supplying the Motion and Brief Bank, upon request, to all public defender offices throughout the state. So far, Cochise County, Navajo County, Pima County and a number of other public defender offices are participating. They will be providing motions and briefs to us for the Bank and receiving copies of the Bank for their computers.

The Motion and Brief Bank will enable public defenders throughout the state to share information. It is remarkably easy to use and takes just a few minutes to learn. Attorneys can access the work product of others simply by typing a few words into the computer. The Bank should save countless hours of research while increasing the overall quality of representation for our clients. Please make use of it. ^

PRACTICE TIPS: Victim Contacts

Last month's "Practice Tips" section highlighted the issue of interpreting the definition of a victim under the Victims' Bill of Rights. Specifically, some prosecutors mistakenly designate witnesses or other parties as victims when there has been no determination that the alleged victim is incapacitated. That is, a victim is a person against whom a criminal offense has been committed, unless the person has been killed or *incapacitated*, in which case the person's spouse, parent, child or other lawful representative may exercise the alleged victim's rights. Last month's "Practice Tip" argues that there must be a judicial determination of incapacitation before prosecutors may designate witnesses as "victims." (cont. on pg. 3)

A similarly unclear statutory provision among practitioners is A.R.S. Sec. 13-4433(B). Apparently, some defense attorneys are taking a restrictive view of this statute by refusing to talk to alleged victims when they contact our office. As with the problem on the definition of a victim, appellate courts have been slow to react to providing guidance. The following discussion, however, should clarify the fact that there is no prohibition to speak directly with a victim who contacts a defense attorney; there is no need to channel that conversation through a prosecutor as A.R.S. Sec. 13-4433(B) appears to suggest as long as the victim *initiated* the contact.

The Statute

A significant amendment was made to A.R.S. Sec. 13-4433(B) in the last legislative session. That amendment became effective on September 30th and was obtained by the work of this office in attending legislative committee meetings to protect the rights of our client community. A.R.S. Sec. 13-4433(B) was amended to provide that:

The defendant, the defendant's attorney or another person acting on behalf of the defendant shall only INITIATE contact WITH the victim through the prosecutor's office.

The capitalized letters indicate the amendments. Obviously, the statute was more problematic prior to these amendments since arguments could be made that crime victims could not waive this provision (a weak argument). The amendment, however, was submitted and enacted specifically to address the issue of crime victims' contacting defense counsel.[1]

Many of the alleged victims in our cases are relatives of the accused. If not relatives, they are friends, and not uncommonly they also agree that the defendant is unjustly accused or that the prosecution seeks punishment that is too harsh.

Defense counsel, the accused or someone else acting on her behalf cannot "initiate" contact with a crime victim by the provisions of A.R.S. Sec. 13-4433(B). However, if a victim contacts you ("initiates"), you have every right to talk with him and ask whether he will submit to an interview. He, of course, has the right to terminate that interview at any time.

Waiver

Even if the amendments to A.R.S. Sec. 13-4433(B) had not been enacted, there are sound public policy arguments, as well as support in the Criminal Rules of Procedure, for the proposition that victim-initiated contact with defense counsel does *not* require informing the prosecutor.

It makes sense that crime victims should always be able to contact defense counsel to tell their side of the story and provide exculpatory information (or inculpatory--which raises a whole new set of issues). Despite the current erosion of fundamental liberties, grossly unfair treatment of the accused is still frowned upon. A victim's free speech should not be silenced by rules created to protect him.

Moreover, Rule 39(E) specifically provides that "[t]he rights and privileges enumerated in this rule may be waived by any victim." Pretty clear stuff. A victim may waive all or any portion of his rights under the Victims' Bill of Rights, including having contact go through the prosecutor. Remember, the alleged victim holds the "rights," not the prosecutor.

Procedures for Talking With Victims:

1. Advising of Rights

If an alleged crime victim contacts you, the prudent thing to do is to advise him that he has a right not to speak with you. There is, however, no law that says you have to inform the victim of that right (remember, it took about two hundred years for the courts to let our clients know they had a right to remain silent by deciding Miranda). Presumably, several people will have already advised the victim of his "rights" before he contacts you. Victims are first informed of their rights by law enforcement, and then immediately thereafter by victim advocates.

Nevertheless, advising alleged victims inures to your advantage. If a controversy develops, it will be clear that you were totally up-front with the complaining witness (strange that the police are permitted to lie, misdirect, and trick our clients to get a "voluntary" confession!). If there ever is a hearing or trial, you will be able to emphasize during cross-examination that the alleged victim was told that he did not have to speak with you, however, he did anyway. Also, let him know he may stop the interview or conversation if he so desires.

2. Representation By An Attorney

Make sure the alleged victim is not represented by an attorney. More and more victims are retaining attorneys to represent them. Speaking with a represented victim could have ethical consequences (*See*, ER 3.4). Permission to speak with an alleged victim represented by an attorney for purposes of the criminal proceeding must be channeled through his lawyer.

However, remember that the prosecutor does not represent the victim. Hence, just because he has spoken to a prosecutor does not prevent your talking with him. Prosecutors are not the alleged victim's lawyer.[2]

3. Others Present

If at all possible, all conversations with alleged victims should be with a third party present, preferably an investigator from our office. Do not place yourself in a situation where an alleged victim may later claim he was intimidated by the defense.

4. Tape Recordings

If a third party is not available (or even if one is), try to convince the alleged victim to allow all conversations to be tape-recorded. Remember, however, there will always be cases where no tape recording is best. While you may not have to turn over solely impeachment evidence to the prosecutor, non-impeachment inculpatory statements could pose a significant ethical problem under the Rules of Criminal Procedure. (cont. on pg. 4)

Explain how tape recording the interview or conversation will benefit him and insure him that no one may later misstate what took place. Do not turn off the tape recorder during the interview; when law enforcement do so it is awfully suspicious.

5. Written Statements

Alternatively, see if the alleged victim will provide a written statement. Have the alleged victim sign and date it for foundation, cross-examination, and impeachment purposes. Let the victim use his own words as much as possible so that it is absolutely clear that it is *his* statement and not defense counsel's.

6. Presence of Clients

Especially in domestic violence cases, where the accused accompanies the alleged victim to the office, try to have the interview without the client present. Explain how it may look coercive and hurt the case if the client is present while you talk to the alleged victim. Try to insure in your own mind that the alleged victim really wants to talk with you.

7. Why Does The Victim Want To Talk?

Ascertain, as soon as possible, why the alleged victim wants to talk with you. Does he have exculpatory information? If so, always determine whether that information has previously been provided to a crime victim witness advocate or the prosecutor. The prosecutor's failure to provide the victim's exculpatory information to the defense may be the basis for a prosecutorial misconduct claim.

Is the alleged victim a friend or relative of the accused? Does he think the prosecutor is seeking an unfair result? Knowing where the victim is "coming from" is essential to understanding how he may be able to help your case.

8. Use A Conversational Style

As with many of our clients, many alleged victims are only looking for someone to tell their story to. They want to be treated with dignity and respect. They may feel, in some situations, that defense counsel is more likely to give them understanding and respect than the government. In other words, do not forget your people skills. You may have an alleged victim who wants to assist with getting a fair plea agreement for your client, or even to have the charges dismissed. Try a more conversational format to discuss the case with the victim instead of "cross-examination." Let them tell their side of the story. Also, let them know they are free to contact you if they think of more information they want you to know.

9. Check Rule 15 Obligations

Lastly, once you have completed an interview or conversation with an alleged victim, make sure you determine whether you have any Rule 15 obligations. Review *Osborne v. Superior Court*, 754 P.2d 331 (Ariz. App. 1988). Remember, statements for impeachment purposes are subject to evidence rules and not Rule 15, and hence may not have to be disclosed until the time they are to be used.

Other Infirmities of A.R.S. Sec. 13-4433

Remember, also, that if you develop an A.R.S. Sec. 13-4433 problem, the statute suffers from several other constitutional infirmities. Making these arguments at the trial level (when you get a case where an interview has been denied, a request for an interview has not been "promptly"[3] transmitted, or some other situation) may inure to the benefit of your client and the entire defense bar. In short, **make a record**. We all need to start preserving victims' issues that are preventing us from adequately representing our clients.

Overbreadth

A strong argument may be made that A.R.S. Sec. 13-4433(B) is also overbroad. Remember, any statute that has First Amendment implications needs to be scrutinized closely. A law may be facially clear, as here, but sweep too broadly if it indiscriminately reaches both protected and unprotected speech. Similarly, if the government may achieve its purpose in a less burdensome fashion, overbreadth may be implicated.

The bottom line is that the Victims' Constitutional Amendment says nothing about channeling requests for interviews through prosecutors. As officers of the court, defense counsel should be permitted to request directly of alleged crime victims whether they wish to have an interview (this is how the federal system works). A.R.S. Sec. 13-4433(B) is simply too broad because it bans all speech with victims without any showing of harm.

For example, if the purpose of the Amendment is to have victims treated with fairness, and to protect them from abuse and harassment, how does sending a victim a letter by U.S Mail directly contravene those stated purposes? What if defense counsel is shopping at the grocery market and engages in a conversation with another patron? The patron turns out to be a victim who initiates a complaint against defense counsel. By prohibiting *all* contact with victims, A.R.S. Sec. 13-4433 is just plain overbroad.

Due Process

Another related problem may be the U.S. Supreme Court's decision in *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2008 (1973). In that case, the Supreme Court held that due process requires that discovery rights in criminal cases should be reciprocal. In *Wardius* the court found that it was fundamentally unfair to require an accused to have to divulge details of his own defense when the state did not have to disclose rebuttal witnesses. The court wrote that "[i]n the absence of a strong showing of state interest to the contrary, discovery must be a two-way street."

(cont. on pg. 5)

Discovery is no longer a two-way street in Arizona. This case, coupled with our own Court of Appeals decision in *State v. Superior Court (Roper)*, 836 P.2d 446 (Ariz. App. 1992), may assist practitioners in certain cases in obtaining discovery on a fundamental fairness basis. Alternatively, must the accused submit his witnesses to pretrial interviews if the witnesses do not wish to talk to the prosecution, in light of victims' rights? Victims do not have to, why should our witnesses have to? Also, since the accused now may have no idea what an alleged victim will say at trial, why should he or she have to divulge his or her defense? The accused must show his cards, but not the government? Sounds unfair.

The Training Division is available to assist practitioners with victims' rights issues, and encourages attorneys to submit victims' rights motions to the editor so that public defenders may share information to help us represent our clients better. **CJ^**

Endnotes:

1. Remember, statutory provisions in victims' rights cases are probably more persuasive than the criminal rules. The constitutional amendment specially grants the legislature the authority to define criminal rules for victims.

2. Arguably, victims now have an independent legal interest in the entire proceedings against an accused. Hence, prosecutors are more likely to become the targets of lawsuits by victims than they care to think about.

3. The term "promptly" appears clearly vague. What is promptly? Is it five days, 30 days, or just before trial? This provision has Sixth Amendment implications, as well as due process considerations.

Alcohol Screening, Education, and Treatment Part II

By Gary Kula

In the September issue of our newsletter, we discussed alcohol screening and the criteria used by the screening agencies to determine the classification level of a DUI offender. In this month's column, we will look at what takes place after the alcohol screening is completed.

A. Completion of the Alcohol Screening

Upon completion of the alcohol screening, the screening agency must determine whether alcohol education or alcohol treatment is appropriate for the offender. This decision is documented on a form issued by the Department of Health Services. On this form, the agency must include all relevant information about the offender, including a history of drug and/or alcohol use, previous treatment, impairments in medical, social, or occupational functioning due to drug and/or alcohol use, the offender's knowledge of the effects of drug and/or alcohol use, the blood alcohol level at the time of the arrest, and the agency's recommendation for education or treatment. The agency must then provide the offender with the names of at least three DWI service agencies that provide the recommended education or treatment.

An interesting situation presents itself at this point because many of the screening agencies also offer the education and treatment programs. Since many clients mistakenly feel that there is some additional benefit in their continuing with their education or treatment at the facility which performed the screening, a potential conflict of interest exists as the agency stands to benefit financially by recommending more extensive treatment or education than may be necessary. For this reason, it is important that defense counsel remain involved during the screening and education/treatment process so that all options may be considered in determining which agency best serves your client's personal needs and financial situation. Your involvement is also important should you or your client dispute the classification made or the recommendations given as to education or treatment. Should this occur, you should file a motion challenging the agency's decision and request a hearing on the issue before the sentencing court.

After the offender has selected an education or treatment provider, he will be required to sign a release of information form so that all test results and relevant information may be passed on to that provider. The screening agency will require the offender to schedule, within five working days, an appointment with the education or treatment provider. The screening agency will send a written referral, including a summary of the screening results, recommendation, and other information requested, to the provider within five working days. The screening agency also has five working days in which to notify the court, in writing, of the results of the screening and the offender's choice of education or treatment provider. The offender will also be required to sign a form at the screening agency acknowledging that he has been advised of the screening agency's procedures and time limits, as well as the consequences of a failure to complete the recommended education or treatment program.

As you can see from the guidelines outlined above, a screening agency is required, pursuant to the Arizona Department of Health Services rules, to provide the courts with notice of an offender's compliance or noncompliance with court-ordered alcohol screening, education, and treatment. While it may be convenient for a court to refer all offenders to one screening agency, it may be in your client's best interests to select a different screening agency or education or treatment provider. Your client's selection of an agency or provider should be based on geographic location as well as the costs involved. As long as the agency and provider have been approved by DHS, you may assure your client that all notice and reporting requirements will be met and that the court will be notified of his compliance with the sentencing order.

B. DWI Alcohol Education

If your client is classified as either a Level III non-problem social drinker/drug user or a Level II potential problem drinker/drug user, he will be required to complete an alcohol education program.

(cont. on pg. 6)

1) Level III Education

A Level III non-problem social drinker/drug user must complete, at a minimum, an 8-hour classroom educational program. These classes must be completed within four consecutive weeks. Under the Department of Health Services guidelines for those classified as Level III offenders, the education programs must include:

a. Pre- and Post-Program Tests approved by the Division of Behavioral Health Services.

b. Alcohol as a drug, and its physiological effects.

c. Other drugs - legal and illegal - and their effects on driving.

d. Psychological and sociological consequences of use/abuse of alcohol or drugs; stages of dependency; and defense mechanisms.

e. Blood alcohol concentration, its calculation and effects on driving performance.

f. Criminal penalties; Division of Motor Vehicles laws and penalties including potential incongruence between sentence and D.M.V. requirements.

g. Community resources and interventions; review of treatment approaches and various programs.

h. Self-assessment of own alcohol/drug use in an interactive or social setting.

i. Alternatives to drinking or using drugs and driving.

j. No more than two hours of the required eight hours of education classes may be devoted to films or other audiovisual instruction.

2) Level II Education

An offender who is classified as a Level II potential problem drinker/drug user must complete a 16-hour classroom education program. The program must be completed within eight consecutive weeks. Level II offenders may not participate or be present in the classes offered to Level III offenders unless the provider is located in a small or rural community or where specialized classes are offered such as in the case of non-English speaking offenders. The Department of Health Services has also established guidelines which require that the Level II education programs include:

a. All content/topics addressed in Level III programs; and

b. Orientation to therapy sessions with emphasis on group process and orientation to self-help groups such as Alcoholics Anonymous and Narcotics Anonymous;

c. During the didactic portion of a Level II education program, a larger number of clients may participate. The group process orientation sessions should not exceed 12 court-ordered participants and a qualified DWI staff member. If family members are allowed to attend the group process orientation sessions, the total number of participants must not exceed 16.

d. An exit summary should be provided to each court-ordered participant to review progress during the program, make recommendations for any therapy or self-help groups and inform the person of the report which will be forwarded to the referring screening agency and court, concerning his participation.

3) Level II and Level III Education Program Fees

The cost of Level II or level III education depends upon the education provider chosen. In Maricopa County, the cost for Level II treatment ranges from $90 up to $400. For Level III treatment, the 8-hour education program ranges in cost from $45 to $200. In addition to those providers which have set fees, there are several which use a sliding fee scale. Information as to each provider's fee schedule for screening, education, and treatment may be found on the list of approved DUI service agencies available through the Office of Behavioral Health Licensure.

Once the offender has completed the education program, a certificate of satisfactory participation or completion will be issued for presentation to M.V.D. The provider must also notify the screening agency, within five working days, that an offender either has or has not successfully completed the education program. The screening agency must then, in turn, relay that information back to the sentencing court within five working days.

C. Level I Treatment

An offender who is classified as a Level I problem drinker/drug user, must complete at a minimum, a twenty-hour treatment program which includes at least ten individual or group sessions. The type and length of treatment required is based upon the information gathered during the screening process as well as the information obtained during a face-to-face intake interview which is conducted prior to the commencement of treatment, to determine the offender's individual needs and goals. The provider then uses this information to develop an individualized treatment plan for each offender. If, during the development of the individualized treatment plan, or during the course of therapy, the provider determines that the offender requires specialized services such as mental health counseling, handicapped services, or services in a non-English language, the offender will be referred to an appropriate agency for these services.

(cont. on pg. 7)

All time spent in specialized programs may be counted by the treatment provider towards the total hours required for Level I treatment. As a prerequisite to the treatment program, an offender may be required to complete a Level II education treatment program. However, those sixteen hours of education may not be counted towards the mandatory minimum of twenty hours of treatment. The same holds true for referrals of the offender to self-help groups such as Alcoholics Anonymous and Narcotics Anonymous. While attendance at A.A. or N.A. may be required as part of the treatment program, time spent in those groups may not be counted as a substitute for the offender's participation in the counseling sessions established for Level I offenders.

If group therapy is recommended as part of the treatment program, each session must last a minimum of two hours. Group size may not exceed twelve clients and a counselor. As part of the therapy process, the offender's family members and significant others are often encouraged to participate in the program, aftercare, and/or self-help groups.

An offender is given four months in which to complete the individualized treatment program. Upon completion of Level I treatment, an exit session must be conducted to review the offender's progress during the program. At this time, recommendations will be made for any continuing therapy, aftercare, or self-help which may be appropriate. The offender will be advised that this recommendation for further treatment will be made part of the report which will be sent back to the referring screening agency as well as the sentencing court. The offender will also be issued a certificate of satisfactory participation or completion for presentation to M.V.D.

The commencement and completion of Level I treatment may be a costly proposition. Depending upon the number of hours which the offender is required to complete in the treatment program, the cost of treatment may range from $150 all the way up to $1,620. Many of the providers of Level I treatment use a sliding fee scale due to the costs involved.

The reporting requirements for treatment providers are the same as those imposed on education providers. The provider must notify the referring screening agency, in writing, within five working days of the offender's failure to make an appointment for treatment. The provider must also notify the screening agency, within five working days, after an offender has completed the treatment program. The screening agency will also be notified if an offender has failed to attend the scheduled treatment sessions.

While it is often the practice of defense attorneys to terminate their involvement in a case following the entry of the sentencing order, a better practice would be that the attorney remain involved throughout the screening and education or treatment process. By remaining involved, an attorney can help walk his client through the maze of testing and referrals, and may save his client substantial amounts of time and money by selecting agencies and providers which are economically and geographically convenient. Above all else, the defense attorney's continued involvement throughout the entire process stresses to the client the importance of the alcohol education and treatment programs.

NOTE: DUI offenders sentenced in Superior Court will be screened and classified, without cost, by the Adult Probation Department during the presentence investigation. For further information, contact Mary Walensa, Director of Presentence Investigations, at 506-3507. For a copy of the approved list of statewide screening, education and treatment agencies, contact the Training Division of this office or the Arizona Department of Health Services (255-1127). ^

Arizona Advanced Reports

Volume 109

State v. Prieto
109 Ariz. Adv. Rep. 34 (CA 1, 3/24/92)

Defendant pled guilty to attempted child molestation. As part of his sentence, he was ordered to pay restitution to the Arizona Department of Economic Security in the amount of $2,581.68 for funds it had paid to the victim and her mother for psychological evaluation, counseling and a parent aide. Defendant contends, for the first time on appeal, that D.E.S. is not a "victim of the crime" under A.R.S. Sec. 13-603(c).

The restitution order was proper. Had the victim spent her own money on the psychological counseling, evaluations and a parent aide, she would clearly have been entitled to the restitution.

D.E.S. stands essentially in the same position as any insurance company paying on a claim, since D.E.S. was presumably honoring an entitlement due the victim. As such, D.E.S. is entitled to reimbursement and the restitution. The order awarding restitution to D.E.S. is affirmed.

[Represented on appeal by Stephanie L. Swanson, MCPD.]

State v. Anderson
109 Ariz. Adv. Rep. 19 (SC, 4/2/92)

At defendant's sentencing on charges of conspiracy to transport marijuana for sale, the trial court failed to impose the mandatory $100.00 felony assessment fee or the $8.00 time payment fee. The trial court later imposed these fees by minute entry. The defendant challenges the late imposition of the fees on appeal. The state failed to cross-appeal.

Defendant argues that the court has no jurisdiction to remand the case for resentencing. Even in the absence of a cross-appeal, the court has jurisdiction to remand for a partial resentencing, since the defendant has successfully challenged the sentence which was imposed by the trial court. The proper way for the trial court to correct an illegal sentence is in open court with the defendant present, not by minute entry. Remanded to the trial court for resentencing on the fees. (*See also*, concurring opinion.)

[Represented on appeal by Spencer Heffel, MCPD.]

(cont. on pg. 8)

State v. Martin
109 Ariz. Adv. Rep. 74 (CA 1, 3/31/92)

Defendant was placed on lifetime probation after pleading guilty to attempted child molestation. Term 20 of his terms of probation specified that he not have any contact with children under 18 without written permission from his probation officer. A petition to revoke was filed against the defendant alleging a violation of this term. The evidence at the revocation hearing showed that defendant's brother, his girlfriend and two children had been over to his house for dinner. Defendant was never alone with the children and there was no evidence of physical or verbal contact. Defendant was found in violation based upon his terms.

The court holds that the word "contact" in Term 20 is too vague to provide notice to the defendant as to what kind of association is prohibited. Remanded for a new disposition hearing on another term violated.

[Represented on appeal by James R. Rummage and Carol A. Carrigan, MCPD.]

State v. Jordan
109 Ariz. Adv. Rep. 48 (CA 1, 3/26/92)

Defendant was indicted on two counts of first degree murder, alleging premeditated and felony murder. Defendant was convicted of felony murder and other charges. During jury selection, a prospective juror of Asian descent was struck from the panel by the state. Defendant is white. The defense challenged the strike under *Batson v. Kentucky*, 476 U.S. 79 (1986) and requested the trial court to require the state to explain its strike. The trial court denied the request.

The court holds that a person of Asian descent is a member of a cognizable racial group for purposes of *Batson*. In order to make a *prima facie* case of purposeful discrimination, requiring an explanation from the state for its strike, one must show facts and circumstances sufficient to raise an inference that the prosecutor used a peremptory strike to exclude a juror solely on account of race. The court finds nothing in the voir dire examination to show a discriminatory purpose and that the defense did not meet its burden to show purposeful discrimination.

In the course of the trial, photographs of the bodies were introduced into evidence. The two victims had been found in a canal, and it was determined that they had died of multiple stab wounds. The court holds that the photographs were properly admitted into evidence, because they were relevant to the issue of premeditation and to the degree of offenses charged.

[Represented on appeal by James L. Edgar, MCPD.]

State v. Lara; State v. Malone
109 Ariz. Adv. Rep. 26 (SC, 4/2/92)

This case was a consolidated proceeding on two Court of Appeals cases. In *Malone*, the trial court aggravated the sentence on an armed robbery conviction, under A.R.S. Sec. 13-702(D)(2), based in part upon the use of a weapon in committing the offense. In *Lara*, the trial court imposed an aggravated sentence on a manslaughter conviction under A.R.S. Sec. 13-702(D)(1), based in part upon the fact that a human being was killed and that a dangerous instrument was used in causing the death.

The court affirms the trial court's use, in *Lara*, of the weapon to not only support the charge of armed robbery, but also to aggravate the sentence. The court affirms the trial court's use, in *Malone*, of the fact that a person was killed as an aggravating factor, even though the death of a person was an element of the offense.

The court specifically rejects the extension of the principles stated in *State v. Orduno*, 159 Ariz. 564, 769 P.2d 1010 (1989), which held that the motor vehicle in a DUI case cannot also be used as a "dangerous instrument" to non-DUI cases. The court instead follows the holding in *State v. Bly*, 127 Ariz. 370, 621 P.2d 279 (1980), which held that double jeopardy and double punishment considerations do not prohibit the legislature from establishing a sentencing scheme in which an element of a crime could also be used for enhancement and aggravation purposes.

[Defendant Lara represented on appeal by Paul C. Klapper, MCPD.]

State v. Gillen
109 Ariz. Adv. Rep. 99 (CA 2, 4/2/92)

Defendant pled guilty to numerous charges. These included two counts of attempted fraudulent scheme and two counts of attempted theft by misrepresentation. The first counts related to a false claim filed with Allstate Insurance Company. Counts three and four were the same charges, involving the Cigna Insurance Company. At sentencing, the trial court imposed concurrent aggravated terms, noting that the crimes were committed for monetary gain and also noting the repetitive nature of the offenses.

Defendant claims that though the court could use the same evidence to support a finding of aggravating circumstances, the court could only weigh the evidence once. The court upholds the sentence, stating that the aggravating factors as to each count are not based on the same evidence and are thus not impermissibly weighed twice against the mitigating factors. It is appropriate for the court to use the same factors again in sentencing defendant on another count.

The court also rejects the defendant's claim that the trial court erred in relying on the motive of monetary gain for the theft as an aggravating factor. The defendant argued that monetary gain is inherent in the "any benefit" element of A.R.S. Sec. 13-2310 or in the theft statutes. Since commission of an offense for monetary gain is specifically enumerated in A.R.S. Sec. 13-702 as an aggravating factor, it may properly be considered.

(cont. on pg. 9)

State v. Diaz
109 Ariz. Adv. Rep. 29 (CA 1, 3/24/92)

The defendant was charged with possession of marijuana, a class 6 felony. Defendant and the state entered into a plea agreement in which defendant agreed to plead guilty to a charge of "possession of marijuana, F-6 (open)." At sentencing, the trial court immediately designated the offense a felony and declined to defer designation of the offense to a later date, as permitted by A.R.S. Sec. 13-702(H). Defendant was also place on probation for three years, with one year in jail as a term and condition of probation. Defendant objected to the immediate designation and requested to withdraw from the plea agreement. Defendant argued that the state had promised him a more favorable disposition under A.R.S. Sec. 13-702(H). The trial court denied the defendant's motion to withdraw.

The Court of Appeals vacates the sentence and remands the case back, holding that the defendant should have been permitted to withdraw from his plea agreement. The court concludes that it is at best unclear from the agreement whether it was merely intended to make defendant eligible for sentencing consideration under A.R.S. Sec. 13-702(H), or whether it was intended to promise the defendant undesignated status. Since the agreement is not clear, the defendant should have been permitted to withdraw. Failure to let him withdraw is an abuse of discretion. (*See also* dissent.)

[Represented on appeal by Spencer D. Heffel, MCPD.]

State v. Guerrero
109 Ariz. Adv. Rep. 93 (CA 2, 3/31/92)

The defendant was convicted, after a trial, of conspiracy to sell a narcotic drugs, offering to sell a narcotic drug and transfer of a narcotic drug. An undercover informant testified against the defendant at trial. His testimony included statements about defendant having supplied him with drugs since junior high school, including selling him marijuana and cocaine. Defendant argued that the testimony constituted improper prior bad acts evidence, but did not object to the foundation (no specific times, dates, places regarding the dealings). He objects to the latter for the first time on appeal.

The court holds there was no error in admitting the evidence because it was to show the course of dealings between the defendant and the witness. The objection as to foundation was not properly preserved for appeal and is rejected.

Defendant claims it was prosecutorial misconduct for the prosecutor to state during closing argument that one pound of cocaine equals 49,000 doses. There was evidence to support this statement and defendant failed to object at trial, waiving the issue.

Defendant claims the court lacked jurisdiction over the conspiracy count where none of the overt acts occurred in that county. Some of the overt acts did occur in the proper county.

Defendant was sentenced to concurrent terms of 7, 10.5 and 10.5 years. Defendant argues that A.R.S. Sec. 13-116 requires that an act punishable under different statutes may only be punished under the less severe of the two statutes. A.R.S. Sec. 13-116 does not preclude the imposition of sentences of differing lengths, so long as they are concurrent.

During the trial, the D.E.A. agent testified that he "tried to interview" the defendant. This was a comment on the right to remain silent, but was harmless error. The prosecutor did not expressly ask about the attempt to interview, did nothing to highlight the statement, and did not raise the issue in his closing argument. Further, the evidence of guilt was overwhelming and uncontroverted. Affirmed.

State v. Rossi
109 Ariz. Adv. Rep. 22 (SC, 4/2/92)

On 8/29/83, defendant went to the victim's home to negotiate the sale of a typewriter. Defendant robbed and murdered the victim by shooting him, then shot and injured a neighbor who entered the victim's home to try to help him. Defendant was found guilty by a jury of first degree murder, attempted first degree murder of the neighbor and burglary in the first degree.

The convictions were affirmed, but the death penalty was reversed and the matter remanded for resentencing. At that resentencing, the death penalty was imposed again. On appeal, the matter was sent back for sentencing again. At resentencing, mitigating evidence was presented showing defendant's cocaine addiction, that defendant had no prior felony convictions and had been a productive member of society. Recommendations of leniency and attestations to defendant's good character from various persons were also presented. This appeal is the third review of the case by the Arizona Supreme Court. Defendant argues that his "significant" cocaine addiction calls for leniency under other Arizona cases. These cases are factually dissimilar with defendant's case because in each of the cases relied upon, impairment was only one of many factors considered in sentencing. In each of the other cases, evidence was presented to show that the defendants were not only addicted to drugs or alcohol, but also either had serious mental illness or were intoxicated. Defendant did not show intoxication at the time of the crimes. The mitigating factors are not sufficiently substantial to call for leniency.

The finding that defendant's cocaine use significantly impaired his ability to conform his conduct to the law does not negate the finding that the murder was cruel, heinous and depraved. There are no "mandatory" mitigating circumstances to automatically negate the above finding.

The court also holds that proportionality reviews are not required by the Constitution, that a judge rather than the jury may determine the existence of mitigating or aggravating factors, and that the Arizona death penalty statute is constitutional.

Norton v. Superior Court
109 Ariz. Adv. Rep. 64 (CA 1, 3/31/92)

Defendant was charged with failure to pay reasonable child support, a felony. Defendant argued that the statute unconstitutionally shifted the burden of persuasion to him. The trial court agreed, severed the unconstitutional provisions, and denied the motion to dismiss. Defendant sought special action relief.

(cont. on pg. 10)

The statute provided that failure to furnish reasonable support is *prima facie* evidence that the failure is willful and without lawful excuse. This provision establishes a mandatory rebuttable presumption that the defendant possesses the requisite intent. Mandatory rebuttable presumptions are unconstitutional if they relieve the state of the burden of persuasion on an element of the offense.

The state concedes that the statute is unconstitutional, but argues that this provision may be severed and the rest of the statute is valid. Courts need not declare an entire statute unconstitutional if the unconstitutional portions may be severed. This portion of the statute may be severed, despite the lack of a severability clause. The trial judge's order is affirmed.

[Petition for special action taken by Nicholas Hentoff, MCPD.]

Volume 110

State v. Atwood
110 Ariz. Adv. Rep. 3 (SC, 4/9/92)

Defendant was charged with kidnapping and murdering an 8-year-old girl. Defendant was convicted by a jury and sentenced to life imprisonment for kidnapping and death for murder.

Sufficiency of Evidence

Defendant claims there is no substantial evidence to support the kidnapping verdict. Comparing the evidence supporting kidnapping with the contrary evidence, there were sufficient probative facts over which reasonable persons could fairly differ. The court admitted into evidence a letter showing defendant's sexual attraction to children and fear of arrest. Defendant claims that the letter should not have been admitted until the state had established *corpus delicti* for kidnapping. The prosecution must establish a reasonable inference of *corpus delicti* before it may introduce a defendant's extrajudicial admissions as evidence of the crime. The circumstantial evidence presented by the state is enough to satisfy the requirement of independent proof. However, the state was not required to satisfy the corroboration rule in this case. The letters were written before the crime. Preoffense statements do not require corroboration because they contain none of the inherent weaknesses of admissions made after the fact.

Defendant argues that the state could not prove defendant guilty of murder beyond a reasonable doubt. The state's theory was that defendant committed felony murder where he killed the child in furtherance of the kidnapping. Only a few fragments of the victim's skeleton were recovered. While these were sufficient to establish identity, they were insufficient to establish how she died. Defendant claims that the state failed to establish that the victim did not die by accident or other means. There was sufficient proof of *corpus delicti* for murder in this case. The record reveals extensive circumstantial evidence satisfying the *corpus delicti* requirement.

Assistance of Counsel

Defendant claims his first trial attorney rendered ineffective assistance of counsel. Defendant claims that his attorney failed to file a sufficient number of pretrial motions but has failed to show any prejudice. Defendant claims his attorney should have filed a Notice of Change of Judge. However, that judge was removed when defendant's own motion was granted and no prejudice resulted. Defendant claims that the first attorney failed to investigate the physical evidence, but has shown no prejudice. The evidence was tested later and there was no showing of anything valuable to the defense. Defendant claims that counsel failed to adequately represent him before the grand jury. Defense counsel's actions were tactical decisions and the later verdict makes any error harmless. Defendant claims that his lawyer failed to interview transient witnesses in time. However, counsel did interview a number of witnesses and defendant has not shown that any witness possessed any information helpful to his defense. Defendant's claim that his counsel failed to adequately communicate with him is denied for lack of prejudice. Defendant claims that his counsel had a conflict of interest in his concern over funds spent on the case. Defendant's unsupported accusation is insufficient to demonstrate a conflict of interest. Defendant finally claims that the Pima County appointment system results in deficient representation under *State v. Joe U. Smith*, 140 Ariz. 355 (1984). There is no indication of any systematic ineffectiveness.

Eyewitness Identification

Defendant claims that the trial court erred in not suppressing tainted eyewitness identifications. Prior to trial, there was extensive media coverage of the defendant's case. Defendant moved to suppress the identification testimony of 14 witnesses, claiming the media exposure had been unduly suggestive. The court found that many witnesses had seen some of the pretrial publicity but found that under the totality of the circumstances, only the testimony of two witnesses needed to be suppressed. The record supports the trial judge's decision to allow the identification testimony of 12 of the 14 witnesses.

Defendant claims that the use of a photo lineup was unduly suggestive and moved to suppress those witnesses' identifications. Even if the identification was suggestive, there was no prejudice to the defendant. One of the witnesses did not testify at all and another witness was called by the defense. A third witness was shown photographs by a defense investigator.

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Exhumation

One month after the discovery of the victim's remains, the bones were buried. Prior to burial, the prosecution notified defendant's trial attorney, who did not object. Defendant's second attorney later moved to exhume the remains. Defense counsel claimed he had an expert who could determine the cause of death. The power to grant exhumation lies within the sound discretion of the trial court. Since defense counsel made cryptic promises and failed to either give the name of the expert or the basis for the expert's potential conclusions, the trial court did not abuse its discretion in denying the motion to exhume.

Police Misconduct

Defendant claims the police committed misconduct by failing to adequately investigate alternative theories of this case. While the police did initially evaluate disparate sources, the investigation quickly narrowed its focus to the defendant. This focus was engendered by the evidence against the defendant, not by an apparent desire of the police or prosecution to find a person to blame. It was not improper for the police to fail to exhaustively investigate the hundreds of reports received from citizens. No misconduct occurred.

Prosecutorial Misconduct

Defendant claims that the prosecutor committed misconduct in a number of ways. Defendant claims that the prosecutor referred to his file of citizen leads as his "cuckoo file." The prosecutor did not refer to the file by that name in front of the jury, and any late disclosure of this file is not error because it did not constitute material evidence.

Defendant also claims that the prosecutor committed misconduct before the grand jury. The court declines to review this matter as the issue had previously been declined for special action jurisdiction.

Defendant claims that the prosecutor committed misconduct during trial. On cross-examination, one witness referred to his lie detector test. Defendant claims it was misconduct for the prosecutor to fail to advise the witness not to refer to the test. The prosecutor admitted failing to admonish the witness but maintained the omission was unintentional. The court's concern is with the fairness of the trial, not the culpability of the prosecutor. Prosecutorial misconduct will not merit reversal unless it denies the defendant a fair trial. The reference to the witness's polygraph is insufficient to suggest an unfair trial and was harmless error in light of the judge's curative instruction.

Defendant claims that the prosecutor committed misconduct through the testimony of a witness who appeared prompted or staged. The trial judge denied a motion for mistrial but instructed the jury that it was not to be influenced by sympathy or prejudice. The trial judge did not abuse his discretion in denying the motion for mistrial and the court does not address the defendant's underlying contention that the testimony was staged.

At trial, the victim's mother testified both in the state's case in chief and as a rebuttal witness. The defendant argues that the prosecutor engaged in misconduct by using this witness to arouse sympathy from the jury. The mother was a witness to many of the victim's activities before the crime and gave testimony rebutting defense evidence. While there was potential prejudice in having the victim's mother testify twice, the trial court did not abuse its discretion in allowing this probative testimony.

One witness at trial testified that a pair of little girl's underpants were found near the victim's remains. The prosecutor asked no further questions about the underpants. Defendant claims it was prosecutorial misconduct to leave the jury with the impression that these had been identified as the victim's underpants. The jury was informed through cross-examination that the victim's mother had not positively identified the underpants. Defendant was not prejudiced.

During trial, the prosecutor made gratuitous comments which defendant claims were made in an attempt to ingratiate the prosecutor with the jury. While most of these comments were innocuous, some of the prosecutor's remarks about defense counsel's closing arguments and motives were attempts to discredit the defense attorney. While such comments are unnecessary and inappropriate, they did not deprive the defendant of a fair trial. The probability that the statements actually influenced the jury's verdict is remote and no reversible error occurred.

Severance

Defendant moved to sever the kidnapping and murder offenses at trial. Defendant claims consolidation of the two charges prejudiced his defense, prevented him from testifying on one charge and not the other, and resulted in a rub-off effect. The trial court did not abuse its discretion in refusing to sever the charges. The kidnapping charge was the underlying offense supporting the felony murder charge. A substantial portion of the evidence regarding the kidnapping would have been admissible at trial for the felony murder charge to provide the jury with a complete picture. Defendant claims that the rub-off effect of the consolidated charges meant that the guilt determination on one charge may have influenced the jury's determination on the other charge. A defendant is not prejudiced if the jury is instructed to consider each offense separately and advised that each offense must be proved beyond a reasonable doubt. The instructions in this case were proper and there was no prejudice to the defendant. As to defendant testifying on one charge and not the other, a severance is not automatic in such situations. A defendant must show that he has both important testimony to give on some counts and strong reasons for not testifying on others. Defendant's general explanation did not reach the level of specificity necessary to meet these requirements.

The state claims that the defendant waived his motion to sever. The state moved to consolidate these charges and the defendant moved to sever. The trial court granted the state's Motion to Consolidate and the defendant renewed his Motion to Sever. Rule 13.4 speaks of filing a motion to sever only after a motion to consolidate has already been granted. The state claims that filing the motion before violates the rule. While the procedure followed may not have followed the letter of the rule, the criminal rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unnecessary delay and expense. The conduct here is not proscribed by any rule and a finding of waiver would contradict the principles of construction provided by Rule 1.2. The defendant's motion to sever was not waived.

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Arrest

Defendant contends that he was improperly arrested by federal authorities and that evidence obtained as the result of the arrest should have been suppressed. Defendant was arrested on a federal warrant for kidnapping. Kidnapping becomes a federal offense only when the victim is willfully transported in interstate commerce. Defendant argues that because no evidence of interstate transportation existed, the warrant was invalid. There is a presumption of interstate transportation found in the federal kidnapping statute. The presumption can constitutionally support probable cause for an arrest warrant.

Defendant also claims that there was no proper presumption of interstate transportation when the defendant's passenger told the FBI that no one else had been in the car. These statements were confirmed when a search of the car failed to reveal supporting evidence. The FBI was not required to accept the passenger's statement as either truthful or informed. An arresting authority is not obligated to release a criminal suspect if he or she makes any exculpatory statement, regardless of its veracity. Further, the passenger's information was not verified until after additional federal charges justifying defendant's continued incarceration had been filed.

Defendant claims that his federal detention was the product of collusion between Arizona and federal authorities to keep him until Arizona investigators could obtain an arrest warrant on state kidnapping charges. Although the victim never left Arizona, her body was not located until several months later. Defendant was properly held for his federal arraignment and set for a preliminary hearing. While subsequent investigation revealed insufficient evidence of a federal offense, the information available at the time validates the detention.

Search and Seizure

Before trial, defendant moved to suppress all items found during two searches of his vehicle. The defendant signed a consent form and validly agreed to the first search. While the potential for coerced consent is greater when a suspect is in custody, there is no indication here that the defendant's consent was involuntary. Under the totality of the circumstances, a defendant's consent may be voluntary even where agents threaten to obtain a warrant if the defendant does not consent.

Defendant claims that the consent form misled him. While the form was intended for consent to search premises, it had been altered to apply to defendant's vehicle. While there were some errors in the alterations, defendant understood that he was consenting to the search of his automobile. The consent validly allowed a complete search, including authority to open bags, suitcases and other luggage. The search was conducted within the bounds of the consent given.

A second search was performed pursuant to a search warrant. Defendant claims the FBI had no authority to tow his car before obtaining the search warrant. Once the defendant was in custody, the FBI became responsible for the car's safekeeping. The vehicle was properly seized incident to the arrest.

Statements

Defendant claims that his statements should have been suppressed because he was improperly advised of his Miranda rights. Defendant was repeatedly administered his Miranda warnings both orally and on printed forms. While the defendant may have been tired, he continued to talk with the agents and made no request nor suggestion to end the discussion. His ability to comprehend was not impaired by drugs or alcohol. Defendant's statements were not irrelevant, immaterial or unduly prejudicial and were properly admitted at trial.

Defendant claims that his statements were inadmissible hearsay because they were neither decidedly exculpatory nor decidedly inculpatory. A statement is not hearsay if it is offered against the party and is his own statement. Statements may be admissions even if they are neither exculpatory nor inculpatory. To be admissible as an admission, it is not necessary to show that the statement was against the interest of the party at the time it was made. The only limitation to the use of an opposing party's words is the rule of relevancy. The defendant's statements about his activities on the day of the crime are relevant. The probative value of the statements substantially outweighed the danger of any prejudice.

Motion to Continue

Prior to trial, the state retained an expert witness. The expert's findings were not disclosed until the day before the interview and one month before trial. Defense counsel requested a continuance which was denied. A continuance shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interest of justice. Defendant says he was prejudiced because other witnesses were not interviewed to accommodate this change of schedule. However, the trial judge permitted the defense to interview any witness before he or she testified, even if recesses were necessary. The record does not indicate that defendant's trial counsel was impaired in any way during the trial and no abuse of discretion has been shown. While a continuance to permit interviews would have been advisable, reversal is not required.

Jury Selection

Defendant claims that the practice of selecting jury pools from voter registration and motor vehicle license lists results in under-representation of minority jurors. The mere observation that a particular group is under-represented is insufficient to support a constitutional challenge. To succeed, defendant must show that the excluded group is a distinctive group in the community, that the representation of the group in jury panels is not in relation to the number of such persons in the community, and that the under-representation is due to systematic exclusion. Defendant has failed to show any systematic exclusion. The court expresses no opinion whether the use of voter registration and motor vehicle license lists could result in systematic exclusion. The court holds only that defendant's proof is insufficient to support his claim.

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Defendant argues that the exclusion of persons who would not be compensated by their employers during his lengthy trial resulted in minorities being under-represented on the panel. To succeed on this claim, a defendant must demonstrate that the excluded persons were members of a group that is a distinct class singled out for different treatment. Defendant has failed to show that persons not employed by businesses that would pay for their jury service constitute a distinctive group. Defendant has failed to show that this problem kept a distinctive group off the jury panel. Persons not employed by large corporations do not constitute a distinct group for purposes of constitutional jury selection analysis.

Defendant also claims that members of the jury commissioner's staff improperly excused prospective jurors who contacted the commissioner's office claiming undue hardship. The jury commissioner assists the courts with the jury selection process. Defendant was not prejudiced by the excusals granted by court personnel acting within the discretion allowed the jury commissioner's office. Defendant was afforded an ample pool from which to select a fair and impartial jury. A defendant is entitled to a fair and impartial jury, but he is not entitled to be tried by any particular jury.

During voir dire, the jury was asked questions regarding the death penalty. Defendant argues that because Arizona juries do not determine the sentence, the jury should not have been death qualified. Questioning the jury regarding capital punishment is permissible where the questioning determines bias which would prevent a juror from performing his or her duty. The defendant neither asserts nor demonstrates that any participant on his jury failed to fulfill his or her obligation.

Jury Instructions

The jury was instructed that kidnapping required them to find that the restraint was with the intent to inflict death, physical injury or a sexual offense on a person. Defendant claims error because the state failed to present sufficient evidence a sexual offense. The state was required to prove only that defendant kidnapped the victim with the intent to commit a sexual offense. While the state never established that a sexual offense occurred, it presented evidence as to the defendant's intent.

Defendant also claims that the instruction on the elements of kidnapping was vague because the term "sexual offense" is ambiguous. People of average intelligence will understand that the term "sexual offense" means illegal sexual conduct. Ordinary words and phrases require no definition. Any sexual activity with a young child is a crime and would be a sexual offense.

Defendant claims that it was improper to instruct the jury on felony murder because it allowed a conviction without the prosecutor's proving specific intent. The prosecutor has broad discretion to charge the defendant with the appropriate crimes. The prosecution was required to prove the specific intent to commit the predicate felony.

Before retiring, the trial court gave an instruction requiring a unanimous verdict. Defendant claims that this instruction was coercive rather than instructive, especially where it instructs the jury to reach an agreement if they can do so without violence to their individual judgment. This instruction was given before deliberations and not to try to break a deadlock. The instruction informs jurors not to surrender their honest convictions and sends no improper messages encouraging them to compromise their individual positions.

Defendant requested a *Willits* Instruction where the state failed to preserve the victim's bones. The state did not act improperly in allowing the burial of the child's remains. Defendant was not entitled to a *Willits* Instruction.

Defendant claims he was entitled to a *Willits* Instruction because the state failed to disclose certain F.B.I. and D.P.S. test results. Defendant does not state which test results were not disclosed. The accusation also is unsupported by the record.

Defendant requested a *Willits* Instruction concerning portions of his taped television interview. The prosecution attempted to have portions of the original interview preserved, but was unsuccessful. While the unedited interview tapes were unavailable, the sheriff's deputy who was present testified about defendant's statements. The defendant has failed to demonstrate any actual prejudice in the destruction of the interview outtakes. The interviewer's recollection of the destroyed materials provided even more damaging recollections of her discussions with the defendant. Defendant has failed to demonstrate that the absent evidence would have tended to exonerate him.

Defendant claims that the trial judge should have instructed the jury on the lesser included offense of unlawful imprisonment. In this case, the defendant proffered an alibi defense. In such a situation, the record usually contains little evidence to support an instruction on a lesser included offense. The evidence presented at trial did not support such an instruction. The possibility that the jury might simply disbelieve the state's evidence on one element of the crime does not call for a lesser included instruction.

Defendant claims it was error not to instruct the jury on lesser included offenses of first degree murder. Defendant's trial counsel requested that the court not instruct the jury on any lesser included murder offenses. A court does not err in refusing to instruct a jury on lesser included offenses in a felony murder case. There are no lesser included offenses of felony murder.

Trial Publicity

The defendant's case generated significant media attention. The trial was eventually moved from Pima County to Maricopa County. Defendant asserts that the media coverage impeded the selection of a fair and impartial jury. The media coverage included gavel-to-gavel television coverage broadcast daily to Tucson. While juries should ideally be selected from citizens free from prior exposure, publicity is now an expected concomitant to crime. While this situation is troubling, it does not necessarily equate with an inability to hold a fair trial.

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Under the totality of the circumstances, the publicity was not so pervasive that it caused the proceedings to be fundamentally unfair. A defendant must demonstrate prejudice unless the coverage was so extensive or outrageous that it permeated the proceedings and created a carnival-like atmosphere. The video broadcasts to Tucson (but not Phoenix) did not diminish the solemnity and sobriety of the courtroom. The trial was held two years after the height of the media coverage. While approximately ½ of the jurors had some prior media exposure to the case, this did not compromise the ability of the jury to fairly adjudicate the case. Defendant has not demonstrated that any of the persons ultimately selected as jurors were unable to lay aside any prior impressions or opinions.

Defendant also claims that publicity during the trial tainted the jury, especially where the judge denied his request to sequester the jury. The decision to sequester a jury lies within the discretion of the trial court. Defendant has failed to demonstrate that the jury was exposed to publicity during the trial.

Courtroom Decorum

A citizen's action group, organized in part because of the community's reaction to this case, attended the trial. Defendant claims he was prejudiced because on at least two occasions group members reacted audibly to the presentation of evidence. The trial judge denied a motion to bar group members from the proceedings. All court proceedings are open to the public unless they raise a clear and present danger to the defendant's right to a fair trial. A clear and present danger means that the substantive evil must be extremely serious and degree of imminence extremely high. Exclusion of spectators is an extraordinary measure and should be done with caution. When defense counsel complained of noise, the judge promptly admonished the entire group of spectators out of the jury's presence. The record reflects no further occurrence of inappropriate behavior. Defendant has failed to prove that actual prejudice resulted from the group's actions at trial. The attendance of group members was also not so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial, as the group members were neither identifiable nor distinct from other courtroom spectators. Organized groups may pose a serious threat to a defendant's right to a fair trial, even if only by passive influence. However, the citizen's action group members here were not sufficiently noticeable, persuasive or influential to deprive the defendant of a fair trial.

Evidentiary Issues

At trial, a witness testified that the defendant explained that he had blood on his hands because he stabbed a man in a drug dispute. He later recanted this story, claiming he had fabricated it to appear "tough" to his friends. Defendant claims that this evidence was hearsay and irrelevant. It is not hearsay if the statement is offered against a party and is his own statement. The story was relevant to show that the defendant would fabricate a story involving a stabbing to explain blood on his hands. Defendant's failure to deny another's statement in the defendant's presence that he has blood on his hands was also admissible as an adopted admission.

Defendant claims that one witness should not have been allowed to testify because the witness, a chronic alcoholic and drug user, was clearly not above lying. These questions go to the weight to be given the witness's testimony, not its admissibility. The witness was also able to testify about a conversation between the defendant and a person now deceased. The dead man's statement to the defendant was not hearsay and did not raise any confrontation clause problem.

At trial, one witness testified that the defendant called his mother and said, "Even if I did do it, you have to help me." Defendant claims that the witness's testimony was irrelevant and inadmissible because the witness heard only half the conversation. Defendant's statement was an admission and therefore not hearsay. Though the statement was prejudicial, it was clearly relevant. The trial court did not abuse its discretion in determining that the statement was admissible.

At trial, a letter written by the defendant before the kidnapping was admitted to show his sexual attraction to children. The recipient of the letter also testified that the defendant had considered picking up another child and that he would make sure that the child wouldn't talk. Defendant argues that this letter improperly admits prior bad acts. Prior bad acts are admissible only for a proper purpose, if relevant, if the probative value substantially outweighs the prejudice and if a limiting instruction is given. In this case, the evidence was properly admitted to show motive and intent. The statements were also relevant to the issue at trial and were not substantially outweighed by the danger of unfair prejudice. The remoteness of these statements is a factor going to the weight, not the admissibility of the evidence. However, the trial judge failed to give a limiting instruction concerning the evidence. While the state argues that counsel did not request a limiting instruction, the record shows that defense counsel did submit a limiting instruction. It was error not to give a limiting instruction. This error does not warrant reversal. The statements were tremendously incriminating and no reasonable probability exists that the result would have been different had the jury been properly instructed. Any error was harmless.

The state's accident reconstruction expert testified that, to his eye, the color of the victim's bicycle and the paint smear on the defendant's car were a perfect paint match. Defendant claims that the question of whether the two paints matched was to be left for the jurors to determine. The testimony was admissible, because visually matching the paint smears was a necessary aspect of the expert's tests. No abuse of discretion occurred.

At trial, one witness testified that it looked as if defendant was living out of his car and that his general appearance frightened him. The trial court allowed these statements because they were relevant to the witness's degree of attention when he saw the defendant. The trial judge did not abuse his discretion.

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Prior to trial, the state's paint expert died. A second expert was hired. Defendant claims he was unfairly precluded from questioning the second expert about areas in which his test results differed from the results obtained by the first expert. The record does not reveal that defense counsel ever objected to the court's prohibition against the use of the first expert's conclusions as impeachment evidence. Even assuming that the defense was precluded from using this evidence, there was no objection to this limitation and no offer of proof made.

At trial, defendant's knives and some sandpaper were admitted into evidence. Defendant did not object. Defendant claims that the knives were irrelevant because the state was unable to establish how the victim died and he recanted his story about stabbing someone else. Defendant did not object and has waived the issue on appeal. The knives and sandpaper were also relevant to the defendant's actions after the murder.

At trial, a pair of girl's underpants, found near the victim's remains, were admitted. Defendant claims that the inability to positively identify the underpants as the victim's made them inadmissible. A witness identified them as similar to a pair owned by the victim. Defendant did not object and has waived the issue on appeal. Further, the lack of a positive identification goes to the weight of the evidence, not its admissibility. The evidence also was admissible to demonstrate the thoroughness of the search of the area where the victim's remains were found.

During the trial, the jury saw videotapes of television broadcasts showing the defendant in custody. The tapes were relevant to questions of out-of-court identification. Defendant claims that permitting the jury to see him clad in jail attire prejudiced his defense. While the television videotapes portray him in a prejudicial light, they were admissible on identification issues. The prejudicial impact of the videos is diminished because they are only of the defendant being transported from police vehicles to various jail facilities and not actually in custody in a jail setting. The videos were also well balanced by the defendant's unfettered presence during the trial.

The Death Sentence

In reviewing the death sentence in this case, the Arizona Supreme Court finds that the death penalty statute is constitutional. The court also finds that the defendant's prior conviction was a proper aggravating circumstance. The court also finds no mitigating circumstances. The court specifically finds that the felony murder verdict does not call for mitigation or for any specific findings. The court also considers the defendant's heavy drug use, proper demeanor during trial, parental support, age, cooperation during arrest, sympathy for the victim's family, intelligence, lack of a violent prior record, and his molestation as a minor, but finds no mitigating circumstances. The court also finds that there was no error in allowing victim impact evidence.

Kidnapping Sentence

Defendant was sentenced to concurrent life in prison for class 2 felony kidnapping. Defendant argues that he should have been sentenced as a class 4 felony kidnapper because the state failed to prove that he did not voluntarily release the victim without physical injury. By proving that the defendant killed the victim, the state proved that defendant did not release her without physical injury prior to his arrest.

Appellate Record and Brief

Defendant claims that he was denied an adequate appeal because the court declined to order that the record be computerized. Defendant claims that failure to computerize the record deprived him of a basic tool necessary to prepare an affective appeal. Defendant's extremely lengthy opening brief belies his contention that his counsel was unable to review the record effectively.

Defendant also claims that the 120-page limitation for his opening brief interfered with his right to appeal. Appellant initially filed a 279-page opening brief which was edited down to 120 pages. Defendant's opening brief threw at the court every conceivable argument. While the court criticizes appellate counsel for bombarding the court with a salvo of dubious claims rather than selecting particularly meritorious arguments, there was no prejudice to the defendant in the page limitation placed on his brief.

The court also declines to rule upon three issues presented in the state's cross appeal. [But see Justice Corcoran's concurrence, especially concerning the question of whether or not a jailhouse informant should have been allowed to testify against the defendant.] ^

Training Calendar

November 23

"New Attorney Training"

The Training Division and Trial Group Coordinators will conduct a three-week training program for five new attorneys who recently joined the office. Training includes an orientation, practice issues, and a mock trial.

December 2

"Managing Stress in a Law Office"

Jeff Miller, a counselor with TERROS and in private practice, will address stress: how to recognize it and its effects; how to handle it through exercise, diet, and attitude. The session will be conducted in our Training Facility from 9:00 to 10:30 a.m.

December 4

"Client Relations"

Repeat of seminar presented earlier in the year for those attorneys who did not attend first presentation. To be held in the Training Facility starting at 1:30 p.m.*

December 28

"The Mechanics of Tape Tampering"

Joel Charles of Florida (an expert on tape tampering, tape enhancement and tapes as evidence) will speak. Attorneys and investigators are invited to the session which will be held in our Training Facility from 3:00 to 4:00 p.m.

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January 14

"Cultural Diversity in the Criminal Justice System"

Professor Clay Dix from ASU and Scott Loos from the Court Interpreter's Office will discuss the different cultures that we encounter and dealing with those differences in the court system. This training, designed for attorneys and support staff, will be held in our Training Facility from 2:30 to 4:30 p.m.

January 22

"Criminal Law Ethics: When You Need the Answer Right Away"** Presentation on case questions and the answers that you need to know right away. Starting at 1:30 p.m. in the Board of Supervisors' Auditorium. Will quality for 2½ hours of Ethics CLE.

February

"DUI 1993"

Annual DUI seminar. Date and speakers to be announced.

March 19

"Native American Issues in Criminal Law"**

Seminar will focus on issues of representing Indians in state and federal court. Presentations on cultural matters, jury selection, language interpretation, and jurisdiction. The seminar is jointly sponsored with the Federal Public Defender's Office and will qualify for CLE. Featured speakers include Judge William Canby of the Ninth Circuit Court of Appeals.

April

"Juvenile Justice & Mental Health Issues"

Date and speakers to be announced.

* Tentatively scheduled.
** Tentative title.

October Jury Trials

August 18

Roland J. Steinle: Client charged with first degree murder, child molestation and kidnapping. Trial before Judge Schneider ended October 06. Client found guilty. Prosecutor V. Imbordino.

September 24

Kevin M. Van Norman: Client charged with child molestation. Trial before Judge Barker ended October 01. Client found guilty. Prosecutor R. Campos.

October 01

Robert C. Corbitt: Client charged with two counts of aggravated assault (dangerous). Trial before Judge Grounds ended October 08. Client found guilty on one count (non-dangerous) and not guilty on the other count. Prosecutor M. Barry.

Albert H. Duncan: Client charged with two counts of aggravated assault (dangerous). Investigator P. Kasieta. Trial before Judge de Leon. Client found guilty on one count and not guilty on the second count. Prosecutor R. Nothwehr.

George G. Gaziano: Client charged with second degree murder. Investigator M. Breen. Trial before Judge Sheldon ended October 15. Client found guilty (non-dangerous). Prosecutor B. Shutts.

Valarie P. Shears: Client charged with theft. Trial before Judge D'Angelo ended October 05. Client found guilty. Prosecutor V. Harris.

October 05

Mara Siegel: Client charged with robbery, burglary and armed robbery. Investigators B. Abernethy, J. Allard and N. Jones. Trial before Judge Anderson ended October 15. Client found guilty. Prosecutor T. Sanders.

October 06

Robert W. Doyle: Client charged with burglary and theft. Investigator H. Jackson. Trial before Judge Wilkinson ended October 08. Client found guilty of burglary and misdemeanor theft. Prosecutor L. Ruiz.

October 12

Michael Walz: Client charged with fraudulent schemes. Trial before Judge Voss ended October 19. Client found guilty. Attorney General's S. Stevens and S. Sundloff.

October 14

Daphne Budge: Client charged with child molestation. Investigator J. Allard. Trial before Judge Martin ended October 21. Client found not guilty. Prosecutor K. Maricle.

October 19

Larry Grant: Client charged with aggravated DUI. Trial before Judge D'Angelo ended October 21. Client found guilty of driving with a suspended license. Prosecutor Z. Manjencich.

October 20

Daniel G. Sheperd: Client charged with attempted child molestation and burglary. Trial before Judge Cole ended October 27. Client found not guilty. Prosecutor B. Jorgensen.

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October 21

Robert C. Billar: Client charged with possession of marijuana for sale (two priors). Trial before Commissioner Gerst ended October 26. Client found guilty (Client failed to return to court; bench warrant issued.). Prosecutor M. Troy.

October 22

Suzette I. Pintard: Client charged with aggravated DUI. Investigator M. Fusselman. Trial before Judge Dann ended October 26. Client found guilty. Prosecutor J. Burkholder.

October 26

Carol D. Berry: Client charged with arson and use of a toxic substance. Trial before Judge Hotham ended October 29. Client found guilty. Prosecutor S. Sherwin.

James A. Wilson: Client charged with possession of dangerous drugs (one prior). Investigator M. Fusselman. Trial before Commissioner Ellis ended October 28. Client found guilty. Prosecutor K. O'Connor.

October 27

Daphne Budge: Client charged with aggravated assault, unlawful flight and aggravated assault on a police officer. Investigator J. Allard. Trial before Judge Gottsfield ended November 05. Client found not guilty. Prosecutor D. Baldwin.

Larry Grant: Client charged with possession of narcotic drugs. Trial before Judge Schafer ended October 29. Client found guilty. Prosecutor K. Mann.

Karen Kemper: Client charged with three counts of sale of narcotic drugs. Investigator D. Erb. Trial *in absentia* before Judge Schneider ended October 28. Client found guilty. Prosecutor L. Martin.

William R. Stinson: Client charged with robbery. Trial before Judge Galati ended October 29. Client found guilty. Prosecutor R. Puchek.

October 28

Jeffrey L. Victor: Client charged with aggravated DUI. Investigator R. Gissel. Trial before Commissioner Ellis ended October 29. Client found guilty. Prosecutor P. Howe.

October Sentencing Advocacy

PEGGY SIMPSON, Client Services Coordinator: Case was referred pre-plea on Aggravated Assault charge. The client had no priors, probation looked a certainty so case was not being actively worked. CSC was approached outside the courtroom by the victim. The victim was informed of his rights but insisted on sharing information. The attorney was able to obtain a dismissal based on the conversation with the victim. This was a rather unorthodox situation but produced the best of results! Attorney: Karen Kemper

PEGGY SIMPSON, Client Services Coordinator: Client pled to Attempted Sale of Narcotic Drugs, Class 3 felony, no agreements but if probation, 120 days flat unless he could be released to a residential drug treatment program. The client was on release and was screened by LARC. Bed space availability was checked out by CSC on day of sentencing and the judge was informed. Client was sentenced to 5 years standard probation, no jail if in-patient treatment at LARC. Attorney: Constantino Flores

Personnel Profiles

OFFICE AIDE:

Ed Cope recently replaced Jason Ingram as the office aide in Group D. Ed, who is the twin brother of Records Aide Gene Cope, is a tennis instructor. He plans to attend night classes at Scottsdale Community College next semester.

NEW ATTORNEYS:

On November 23rd, five new attorneys will enter our attorney training program. Four of them are already familiar to our office as they have been serving as law clerks. They are John Brisson, Patricia Ramirez, Paul Ramos, and Genii Rogers. Patricia and Genii will be assigned to Group A, Paul to Group C, and John to Group D.

Greg Parzych is the fifth new attorney. He earned an undergraduate degree in Criminal Justice at the University of Wisconsin-Milwaukee. In May he graduated from Marquette University Law School where he was the Managing Editor of his Law Review. Following his graduation, he worked as bailiff for Judge Goodfarb. Greg will go to Trial Group C.

TRIAL GROUP COORDINATOR:

Emmet Ronan, trial attorney in Group C, has been named the Trial Group Coordinator for our SEF office. Emmet's new assignment begins December 14th.

LAW CLERKS:

On January 4th, five new law clerks will begin work at our office.

(1) Sylvina Cotto, who has an undergraduate degree in Psychology from ASU, will graduate from ASU in December. Sylvina was an extern at our Juvenile Division this past spring, and formerly clerked at the Attorney General's Office (Child Support Enforcement) and APAAC. Sylvina is fluent in Spanish and will work in Trial Group C.

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(2) Tennie Martin has an undergraduate degree in Accounting from the University of Florida and worked as a CPA for several years. She will graduate from ASU next May. Tennie is one of Gary Kula's externs this semester, and next semester will work 20 hours per week as a law clerk in Trial Group D.

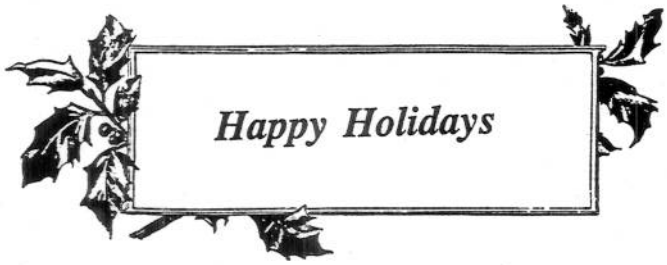
(3) Craig McMenemy, who earned an undergraduate degree in Business from ASU, will graduate from ASU next May. During the summer, Craig participated in Gary Kula's externship program, and earlier served as a volunteer in this office. This semester Craig is an extern with the Federal Public Defender's Office, and next semester he will work 20 hours per week as a law clerk in our Trial Groups A and D.

(4) Christina Phillis has an undergraduate degree in Political Science from ASU, and will graduate in December from California Western School of Law where she was a finalist in the appellate argument competition. Christina has served as a law clerk at the Child Advocacy Office of the San Diego Public Defender. Presently she is participating in our Juvenile Division externship program and will start clerking in that division on January 4th.

(5) Renee Scatena earned an undergraduate degree in Communication with an English minor, and will graduate from ASU next May. She was a finalist in the Moot Court closing argument and client counseling competition. Renee has worked as a law clerk for the Honorable Roger Strand (U.S. District Court), and during the summer she was one of Gary Kula's externs. Beginning in January, Renee will work 20 hours per week as a law clerk for Trial Group A.

LEGAL SECRETARY:

Alice Flores will join Group D as a legal secretary on December 7th. She previously worked as a secretary at Bull HN. Alice, who is fluent in Spanish, worked in the Mesa Justice Court from 1961 to 1968. ^



Bulletin Board

WordPerfect in One Hour for Lawyers

Here's a book that many attorneys have been waiting for. The American Bar Association has created a 35-page book that (1) introduces WordPerfect; (2) teaches typing and printing of text; (3) provides instruction on creating, saving and retrieving files; and (4) advises on text appearance and file "housekeeping," e.g., setting up directories.

Anyone interested in borrowing WordPerfect in One Hour for Lawyers should see Teresa Campbell who will check it out to you.

Speakers Bureau

Jodi Weisberg has joined our Speakers Bureau. Jodi adds expertise to our bureau in an area previously uncovered -- Mental Health issues. For 4½ years she has served as one of the two attorneys in our Mental Health Division at the Maricopa County Medical Center, Psychiatric Annex.

Tom Klobas recently repeated his participation in the Courthouse Experience Program. In addition to giving school children a tour of superior courts, Tom goes to the school beforehand and explains the criminal justice system before the students come downtown to see the courts in action. Tom believes that this extra step prepares the pupils to better absorb all that they see when they are actually in the courtrooms.

Anyone interested in joining or using the services of the Speakers Bureau should contact Georgia Bohm at 506-8200.

Holiday Food Baskets

The Maricopa County Adult Probation Department is beginning to work on their annual drive for Holiday Food Baskets. These baskets go to needy clients who are on probation under Maricopa County Superior Court. Last year, their department was successful in supplying food baskets to over 150 families through the generosity of others.

They are inviting our office to participate again in this worthwhile endeavor by purchasing raffle tickets or making cash donations. (Checks should be made payable to "Volunteer Trust Fund.")

Interested people should contact Gloria Washington at 700 East Jefferson, Suite #400, Phoenix, Arizona 85034, telephone #440-4400.

Editor's Note

You may have noticed the little recycling logo on our newsletters lately. We are concerned about the environment and are eager to do our part to conserve our resources. Thus, we are now printing on recycled paper. ^